

UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF NEW HAMPSHIRE

Daniel D. Small

v.

Civil No. 04-cv-405-PB

Bruce Cattell, Warden,  
Northern New Hampshire  
Correctional Facility

O R D E R

Daniel Small has filed a motion (document no. 11) seeking reconsideration of the Court's January 23, 2006 Report and Recommendation (document no. 10). In the January 23 Report and Recommendation, I recommended that Small's petition be dismissed in its entirety as it was a "mixed petition" containing both unexhausted and exhausted claims.

Previously, on February 8, 2005, I issued an Order (document no. 5) directing Small to amend his original petition (document no. 3) to either demonstrate exhaustion of his unexhausted claims or to choose to forego his unexhausted claims. At that time, I advised Small that choosing to forego unexhausted claims would "likely prevent those claims from ever being raised in a federal habeas petition" as a result of 28 U.S.C. § 2254(b)(3)'s

prohibition against successive habeas petitions. See Order of Feb. 8, 2005 at \*16. Instead of demonstrating exhaustion or foregoing his unexhausted claims, however, Small allowed the petition to be stayed and returned to the state court and filed a motion for new trial. When that litigation was concluded, Small returned to this Court and filed an amended petition for habeas relief (document no. 9). I construed both the petition and the amended petition as a single aggregate petition and recommended dismissal in my January 23 Report and Recommendation because Small's petition was still "mixed."

Small's current motion requests that the Court proceed with his exhausted claims. Small seeks specifically to forego his unexhausted claims. Because Small has been advised that foregoing his unexhausted claims is likely paramount to a waiver of his ability to raise those claims in the future, I will accept his election to proceed at this time only on his exhausted claims.

Accordingly, I will withdraw all but that part of my January 23, 2006 Report and Recommendation that recommends dismissal of Small's unexhausted claims numbered:<sup>1</sup> 1-6, 8-21, 23-36, 38, 50,

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<sup>1</sup>I will refer to the claims as numbered in the Appendix to my February 8, 2005 Order and my January 23, 2006 Report and

54-56, 59, 73, 75-77, 87, 94, 101, 102, 106, 110, 115, 116, 118, 120, 121, 123-125, 127, 128, 130, and 131. I will direct that the claims for which Small has demonstrated exhaustion be answered at this time. The exhausted claims are numbered: 7, 22, 37, 39-49, 51-53, 57, 58, 60-72, 74, 78-86, 88-93, 95-100, 103-105, 107-109, 111-114, 117, 119, 122, 126, and 129.

Accordingly, I order the exhausted claims remaining in the petition to be served on respondents. See Rule 4 of the Rules Governing § 2254 Proceedings ("§ 2254 Rules"). The petition shall be served upon Respondent, who shall file an answer or other pleading in response to the allegations made therein. See id. (requiring reviewing judge to order a response to the petition). The Clerk's office is directed to serve the New Hampshire Office of the Attorney General as provided in the Agreement On Acceptance Of Service, copies of this Order, the Feb. 8, 2005 Order (document no. 5), the Jan. 23, 2006 Report and Recommendation (document no. 10), and the habeas petition, amended habeas petition, and motion for reconsideration (document nos. 3, 9 & 11). Respondent shall answer or otherwise plead within thirty (30) days of the date of this Order. The answer

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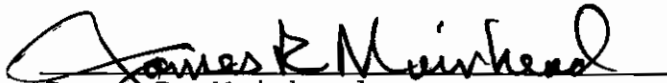
Recommendation.

shall comply with the requirements of § 2254 Rule 5 (setting forth contents of the answer).

Upon receipt of the response, the Court will determine whether a hearing is warranted. See § 2254 Rule 8 (providing circumstances under which a hearing is appropriate).

Petitioner is referred to Fed. R. Civ. P. 5, which requires that every pleading, written motion, notice, and similar paper, after the petition, shall be served on all parties. Such service is to be made by mailing the material to the parties' attorneys.

**SO ORDERED.**

  
James R. Muirhead  
United States Magistrate Judge

Date: February 9, 2006

cc: Daniel D. Small, *pro se*